IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CRIMINAL JURISDICTION

CRIMINAL WRIT PETITION NO.1558 OF 2007
WITH
CRIMINAL WRIT PETITION NO.1559 OF 2007
AND
CRIMINAL WRIT PETITION NO.1560 OF 2007

M/s. Shelatkar Construction Pvt. Ltd. and anr.
....Petitioners.
Vs.
M/s.Creative Enterprises and anr.
....Respondents.

Mr.S.V.Marwadi for the Petitioners.
Mr.A.S.Shitole,A.P.P. for the State.

CORAM: B.H.MARLAPALLE, J.
DATE : August 23, 2007

P.C.

1. Heard Mr. Marwadi, the learned counsel for the common petitioners in all these three petitions and there is a common grievance. They are being decided by this common order.

2. The petitioners are the accused in three different criminal cases filed by the respondent No.1 before the learned Metropolitan Magistrate, Mumbai and they are registered as C.C. No.710/SS/2006, C.C.No.711/SS/2006 and 712/SS/2006. During the trial of all these complaints, the complainant through its partner Mr.Narsiha N. Patel filed an affidavit by way of evidence in examination-in-chief. Alongwith the same

certain documents were brought on record. The accused therefore, filed separate applications for an order to issue summons to the accused and to examine him for recording his examination in chief with regards to the facts stated by him in the affidavit. A reliance in this regard was placed on the provisions of Section 145(1) of the Negotiable Instruments Act,1881. These applications filed in all the three complaints came to be rejected by the learned Metropolitan Magistrate on or about 18.7.2007 and hence, these petitions challenging the said order.

3. The learned Metropolitan Magistrate held that the evidence in the form of affidavit is subject to cross examination under Section-145 of the Negotiable Instruments Act and all omissions and contradictions can be brought on record during the course of the cross examination and therefore, there is no question of causing prejudice to the petitioners. The learned Metropolitan Magistrate also held that when the provisions of Section-145 of the Act permitted to lead evidence by way of an affidavit and which the petitioners have exercised, they cannot be called upon contrary to the provisions of the said section to enter into the witness box and to lead evidence on the facts stated in the affidavit.

4. Mr. Marwadi, the learned counsel for the accused referred to Section 296 of the Code of Criminal Procedure and Section 16,61 of the Indian Evidence Act. He submitted that when the affidavit by way of examination-in-chief is presented by the complainant in the cases filed under Section-138 of the Negotiable Instruments Act,1881 invariable attempts were made to fill up the lacuna/defiencies in the complaint. In addition, the documents which are required to be filed alongwith the complaint are sought to be brought on record alongwith the affidavit by way of examination-in-chief and during the course of cross examination when questions are put to these witnesses, the documents are exhibited. Mr. Marwadi referred to the contents of the affidavit filed in the instant case and more particularly, the postal envelope sought to be brought on record with the said affidavit. He submitted that if any question is asked on the said envelope, the learned Metropolitan Magistrate is required to exhibit it and it would thus become the proved document and will have to be admitted, even though the postman concerned may not be a witness available for recording his evidence, so as to bring on record the factum of service of the postal envelope on the addressees namely the accused.

5. Having regard to the scheme of Section

138,139,140,141 of the Act the documents either submitted alongwith the complaint or alongwith affidavit in examination-in-chief even if exhibited, cannot be read in evidence per se. For example, there is a bankers slip regarding dishonour of the cheque, the right of the accused to issue summons to the concerned bank officer for examining him as a witness cannot be taken away. Such an envelope if exhibited, the action cannot be the proof of service or failure to accept the said envelope by the addressee unless the postman concerned has been examined. All these things can be brought on record by way of cross examination on the affidavit. The erroneous approach followed in some cases cannot be a reason to accept as a general proposition that the affiant is required to be put in the witness box for recording his examination-in-chief regarding the facts stated in the said affidavit over and above the facts as stated in the complaint. In Criminal Writ Petition No.l781 of 2007 and Criminal Application No.382 of 2007 similar grievance was raised before this court namely the right of the accused to pray for issue of summons to the affiant for recording his examination-in- chief. It is well settled that when an affidavit by way examination in chief is presented in the trial, the same is not to be exhibited per-se unless the affiant stands in the witness box and states on oath that the facts stated in the said affidavit are correct

and as per his knowledge and belief and after recording such verification the affiant is subjected to cross examination by the accused. The learned Metropolitan Magistrate while passing the impugned order has certainly demonstrated his awareness of the procedural law and therefore, no prejudice has been caused to the present petitioners by the impugned order rejecting the applications for issue of witness summons. I am sure that the trial court will take into consideration the observations made in this order and take all the possible steps to comply with the procedural requirements while conducting the trial in the aforesaid complaints. Petitions are therefore, rejected.

6. At this state Mr.. Marwadi stated that the trial court has issued non bailable warrant on 16.8.2007 against the petitioner No.2 and he states that the petitioner N o.2 will appear before the trial court on or before 28.8.2007. Undertaking is accepted. In view of the aforesaid undertaking the non bailable warrants so issued are hereby stayed upto 28.8.2007.

7. The learned A.P.P. on behalf of the respondent No.2 states that he will take appropriate steps to communicate this order to the concerned police station.

(B.H. MARLAPALLE, J.)